

2023 CRIMINAL DECISIONS (Jan. 1 to June 30, 2023)

PRETRIAL

Accusatory instrument

People v Rodriguez

214 AD3d 908

(2d Dept) (3/27/23 DOI)

Reversed, plea vacated, and misdemeanor information for 3rd degree possession of a forged instrument dismissed as facially insufficient. Allegation that the defendant's car had a "forged buy tag," based on an NYPD officer's training in the detection and identification of forged instruments, was too conclusory.

[People v Rodriguez \(2023 NY Slip Op 01593\)](#)

People v Camlin

215 AD3d 1013

(3d Dept) (4/10/23 DOI)

SCI dismissed as jurisdictionally defective. Although the waiver of indictment was signed by the defendant and dated, the record did not show that the execution occurred in open court, as constitutionally required.

[People v Camlin \(2023 NY Slip Op 01821\)](#)

People v West

215 AD3d 1067

(3d Dept) (4/17/23 DOI)

SCI charging criminal mischief in the 3rd degree dismissed as jurisdictionally defective. When the defining statute of the crime charged contains an exception, the charging instrument must allege that the crime is not within that exception.

[People v West \(2023 NY Slip Op 01921\)](#)

People v Solomon

39 NY3d 1114

(COA) (4/24/23 DOI)

People's appeal from order which reversed conviction and dismissed the SCI because it was filed after the grand jury's indictment. Affirmed. The SCI was a nullity and was properly dismissed.

[People v Solomon \(2023 NY Slip Op 02030\)](#)

People v Lacy

216 AD3d 439

(1st Dept) (5/8/23 DOI)

Indictment for persistent sexual abuse dismissed as jurisdictionally defective because it did not specify which of three discrete qualifying offenses the defendant was alleged to have committed.

[People v Lacy \(2023 NY Slip Op 02394\)](#)

People v Saenger

39 NY3d 433

(COA) (5/22/23 DOI)

Aggravated family offense charge dismissed as jurisdictionally defective. That count in the indictment alleged that the defendant had “committed an offense specified in (Penal Law § 240.75 [2])” but did not specify the offense, and that subdivision enumerated 54 offenses. The defendant was not given sufficient notice as to the charges against him.

[People v Saenger \(2023 NY Slip Op 02735\)](#)

Grand jury

People v Congdon

214 AD3d 1454

(4th Dept) (3/27/23 DOI)

Reversed and indictment dismissed. The defendant was charged with multiple counts of promoting a sexual performance by a child. Error for prosecutor not to instruct the grand jury that an affirmative act—beyond viewing the images of a sexual performance by a child on a computer—is required to establish promotion of images.

[People v Congdon \(2023 NY Slip Op 01622\)](#)

People v Ashley

216 AD3d 1439

(4th Dept) (5/8/23 DOI)

Guilty plea vacated and indictment dismissed. The grand jury was illegally constituted because a juror had previously been convicted of a felony offense. County Court erred in requiring a showing of prejudice. A violation of CPL 210.35 (1) requires automatic dismissal of the indictment.

[People v Ashley \(2023 NY Slip Op 02432\)](#)

Statutory speedy trial

People v Brown

214 AD3d 823

(2d Dept) (3/20/23 DOI)

People’s appeal. Affirmed. People’s statement of readiness, made within the speedy trial limit, was illusory because they did not file a COC. Defense counsel did not allege that any discovery was missing. But because the People never filed a COC, dismissal of indictment was warranted.

[People v Brown \(2023 NY Slip Op 01306\)](#)

People v Gaskin

214 AD3d 1353

(4th Dept) (3/20/23 DOI)

The trial court erred in denying the defendant’s 30.30 motion solely based on his failure to establish prejudice due to late disclosure. In light of the court’s failure to consider whether the People’s COC was filed in “good faith and reasonable under the circumstances,” decision was reserved and the matter was remitted.

[People v Gaskin \(2023 NY Slip Op 01415\)](#)

SUPPRESSION

Arrest warrant

People v Jones

214 AD3d 483

(1st Dept) (3/20/23 DOI)

Error to deny suppression motion. Before entry, officers executing the arrest warrant identified themselves as police but did not give notice of their purpose.

[People v Jones \(2023 NY Slip Op 01262\)](#)

Identification

People v Alcaarez-Ubiles

214 AD3d 1470

(4th Dept) (3/27/23 DOI)

Reversed and remanded for *Rodriguez* hearing. Lower court erred by relying on a witness's trial testimony to establish that a pretrial photographic ID procedure was confirmatory and thus did not require CPL 710.30 notice. Prior familiarity should be established before trial.

[People v Alcaarez-Ubiles \(2023 NY Slip Op 01637\)](#)

Miranda

People v Trice

213 AD3d 954

(2d Dept) (2/27/23 DOI)

Guilty plea vacated and case remanded. The defendant's un*Mirandized* statements—made when he was questioned by a State trooper after he and another man were detained for matching a suspect description—constituted custodial interrogation. The defendant's hands were placed on the hood of a police car, police vehicles blocked off the street, and he was not free to leave.

[People v Trice \(2023 NY Slip Op 01015\)](#)

Parent-child privilege

People v Kemp

213 AD3d 1321

(4th Dept) (2/14/23 DOI)

Lower court erred in denying suppression of recorded statements made by the 15-year-old defendant to his father in police station interview room. Parent-child privilege applied because the teen was attempting to speak to his father in confidence and for the purpose of obtaining support, advice, or guidance.

[People v Kemp \(2023 NY Slip Op 00776\)](#)

Preservation

People v Miller

212 AD3d 735

(2d Dept) (1/23/23 DOI)

People's appeal. Suppression affirmed. The People's contention that an exception should be made to the exclusionary rule was unpreserved. Supreme Court's statements in this regard were mere dicta, which did not influence the court's final determination and thus did not establish that the court "expressly decided" the issue (*see* CPL 470.05 [2]).

[People v Miller \(2023 NY Slip Op 00219\)](#)

Probable cause

People v Watkins

213 AD3d 467

(1st Dept) (2/14/23 DOI)

Reversed and suppression motion granted. The defendant's post-arrest statement should have been suppressed because the People failed to submit evidence that would permit the inference that information constituting probable cause for the arrest had been communicated from the interviewing detective to the arresting officers.

[People v Watkins \(2023 NY Slip Op 00742\)](#)

People v Suttles

214 AD3d 1313

(4th Dept) (3/20/23 DOI)

Plea vacated, suppression motion granted, and indictment dismissed. Two officers testified that they stopped the vehicle in which the defendant was a passenger after visually estimating the speed at 40-45 mph in a 30 mph zone. No proof showed the officers' qualifications to make the estimates.

[People v Suttles \(2023 NY Slip Op 01380\)](#)

People v Tyler

215 AD3d 884

(2d Dept) (4/24/23 DOI)

People's appeal after lower court granted the defendant's suppression motion. Affirmed. The traffic stop was not legal. There was no evidence that the officer was trained in visual speed estimation or that the defendant's speed was unreasonable under the conditions.

[People v Tyler \(2023 NY Slip Op 02020\)](#)

People v Scott

216 AD3d 552

(1st Dept) (5/30/23 DOI)

Guilty plea vacated and suppression motion granted. The traffic stop was valid, but the warrantless sweep of the car did not fall within any exception to the warrant requirement and was therefore unconstitutional. Officers never saw the defendant or the driver turn to the back seat; and nothing indicated that a weapon in the vehicle posed an actual and specific danger.

[People v Scott \(2023 NY Slip Op 02769\)](#)

Reasonable suspicion

People v Johnson

2023 NY Slip Op 02734

(COA) (5/22/23 DOI)

Conviction reversed and evidence suppressed. No reasonable suspicion where police observed the defendant: (1) making movements inside his vehicle; (2) pulling up his pants and attempting to buckle his belt; and (3) appearing nervous while being questioned. Thus, level-three stop and frisk was not warranted.

[People v Johnson \(2023 NY Slip Op 02734\)](#)

Search Warrant

People v Capers

213 AD3d 947

(2d Dept) (2/27/23 DOI)

People's appeal. Suppression affirmed. The search warrant—which described the subject location as a two-story, two-family home with separate entrances and alleged that there was reason to believe that guns and ammo might be found at the subject premises—was overly broad. The sole basis for warrant was information from a CI, who had only seen guns in the downstairs unit.

[People v Capers \(2023 NY Slip Op 01011\)](#)

Wiretap

People v Myers

39 NY3d 130

(COA) (2/14/23 DOI)

Reversed. Communication intercepted by a wiretap is not exempt from CPL 700.70 notice requirements because it was incidentally captured on a separate jail call recording. Because the jail call was “derived” from the wiretap, the People's failure to comply with statute precluded admission of the proof at trial.

[People v Myers \(2023 NY Slip Op 00691\)](#)

GUILTY PLEAS

Appeal waiver

People v Rabidou

214 AD3d 1004

(2d Dept) (4/3/23 DOI)

Waiver of appeal was invalid. The written waiver mischaracterized the rights being forfeited as encompassing the right to counsel and poor person status and as an absolute bar to all postconviction relief, including relief under CPL article 440.

[People v Rabidou \(2023 NY Slip Op 01692\)](#)

People v Torres

216 AD3d 675

(2d Dept) (5/8/23 DOI)

The plea court erroneously conditioned the promised sentence on the defendant's waiver of his right to appeal without articulating the reason for such requirement. Generic reasons such as judicial economy and avoiding a trial are insufficient.

[People v Torres \(2023 NY Slip Op 02335\)](#)

Duress

People v Rodriguez

213 AD3d 778

(2d Dept) (2/14/23 DOI)

Reversal warranted where the defendant's allocution raised issues of duress, and the trial court failed to inquire into the plea's validity.

[People v Rodriguez \(2023 NY Slip Op 00678\)](#)

Gravity knives

People v Arroyo

215 AD3d 475

(1st Dept) (4/17/23 DOI)

Conviction for CPW 4 vacated and dismissed in the interest of justice. Although the legislative amendment that decriminalized the simple possession of gravity knives does not apply retroactively, the People consented to dismissal.

[People v Arroyo \(2023 NY Slip Op 01945\)](#)

Negated element

People v Vanwuyckhuyse

213 AD3d 1286

(4th Dept) (2/14/23 DOI)

Criminal contempt 2nd requires "intentional disobedience or resistance." The defendant's plea allocution negated an element of the crime when he stated that he "did not intend to violate" and "didn't intentionally violate" the underlying OOP and asserted that any violation "was unintentional."

[People v Vanwuyckhuyse \(2023 NY Slip Op 00754\)](#)

Peque violations

People v Hernandez

214 AD3d 900

(2d Dept) (3/27/23 DOI)

Appeal held in abeyance and remitted to allow the defendant to move to vacate his plea. Although the defendant acknowledged that he might lose his Temporary Protected Status because of his plea, the record did not demonstrate that the court mentioned, or that he was aware of, the possibility of deportation.

[People v Hernandez \(2023 Slip Op 01530\)](#)

People v Almonte

216 AD3d 811

(2d Dept) (5/15/23 DOI)

County Court failed to warn the defendant of the possible deportation consequences of plea. Considering his showing that he probably would have gone to trial had he been properly warned, the error warranted vacatur of the plea.

[People v Almonte \(2023 NY Slip Op 02531\)](#)

Post-release supervision

People v Pryor

2023 NY Slip Op 03241

(2d Dept) (6/20/23 DOI)

Reversal of judgment upon guilty plea. The defendant was not informed of the specific period of post-release supervision to be imposed or the maximum potential duration.

[People v Pryor \(2023 NY Slip Op 03241\)](#)

Right to counsel

People v Holmes

2023 NY Slip Op 03186

(COA) (6/20/23 DOI)

Guilty plea vacated. Although recognizing that the defendant unequivocally requested to proceed pro se, the trial court failed to conduct the requisite “searching inquiry” to ensure that his waiver of counsel was knowing, voluntary and intelligent.

[People v Holmes \(2023 NY Slip Op 03186\)](#)

TRIALS

Constitutional speedy trial

People v Regan

2023 NY Slip Op 01353

(COA) (3/20/23 DOI)

Reversed and indictment dismissed. People’s inexplicable 31-month preindictment delay in obtaining a warrant for the defendant’s DNA to compare against a sample recovered from the complainant violated his right to prompt prosecution.

[People v Regan \(2023 NY Slip Op 01353\)](#)

Evidentiary errors

Expert testimony

People v Ramis

213 AD3d 951

(2d Dept) (2/27/23 DOI)

New trial granted. Experts testified that substances allegedly possessed by the defendant were heroin or cocaine based on a comparison to standard samples in the lab known to be those drugs, but no testimony established the standard or testing used.

[People v Ramis \(2023 NY Slip Op 01013\)](#)

Impeachment

People v Sams

216 AD3d 1003

(2d Dept) (5/22/23 DOI)

Reversal. Error to permit the prosecutor to impeach her own witness. The witness's testimony, that he did not see the perpetrator's face and did not see the defendant fire a gun, did not contradict or disprove any of the People's evidence.

[People v Sams \(2023 NY Slip Op 02684\)](#)

Molineux

People v Smith

214 AD3d 679

(2d Dept) (3/6/23 DOI)

Reversed and remitted for new trial. Testimony that the defendant committed an armed bank robbery one month after the murder was improperly admitted as *Molineux* evidence.

[People v Smith \(2023 NY Slip Op 01106\)](#)

People v Woody

214 AD3d 157

(1st Dept) (3/20/23 DOI)

Reversed, new trial. Trial court erred by allowing the People to admit evidence of the defendant's prior gun conviction to explain the reporting officer's belief that he was armed and why 100 officers responded to the scene after he fled.

[People v Woody \(2023 NY Slip Op 01263\)](#)

Rosario

People v Matthews

212 AD3d 512

(1st Dept) (1/23/23 DOI)

Appeal held in abeyance, remanded for an in camera review of two police officers' memo books. Supreme Court should have reviewed the memo books to determine if they contained statements the victim made to the officers and therefore constituted *Rosario* material.

[People v Matthews \(2023 NY Slip Op 00243\)](#)

Grossly unqualified jurors

People v Fisher

212 AD3d 984

(3d Dept) (1/23/23 DOI)

Dissent opined that juror was grossly unqualified. After deliberations had begun, an inquiry in response to a juror note indicated that she was certain that the defendant had followed her home following jury selection, raising startling safety concerns. Yet County Court failed to engage in the necessary inquiry.

[People v Fisher \(2023 NY Slip Op 00248\)](#)

People v Mentor

213 AD3d 775

(2d Dept) (2/14/23 DOI)

Reversed. Trial court erred in failing to conduct a sufficiently probing and tactful inquiry of a juror that defense counsel twice asked to have removed as grossly unqualified. Juror had fallen asleep or was “extremely sleepy” through the trial.

[People v Mentor \(2023 Slip Op 00677\)](#)

Jury charges

People v Reid

212 AD3d 845

(1st Dept) (1/30/23 DOI)

New trial. Because the defendant had been arraigned on a special information and admitted a prior conviction, the court instructed the jury that, to find him guilty of 2nd degree CPW, they only needed to find that he knowingly possessed a loaded firearm. But the prosecution was limited by the indictment, so it was error to omit from the jury charge the element of possession outside the defendant’s home or business.

[People v Reid \(2023 NY Slip Op 00336\)](#)

People v Rayford

213 AD3d 1337

(4th Dept) (2/14/23 DOI)

Reversed. Error in determining that a justification charge was unavailable where there was an unintentional stabbing. Based on the defendant’s testimony, the jury could have reasonably found that the complainant was the initial aggressor and that his actions were justified, even if the resulting injuries were unintended.

[People v Rayford \(2023 NY Slip Op 00786\)](#)

People v Ross

214 AD3d 1319

(4th Dept) (3/20/23 DOI)

Reversed. Error to grant People’s request for a constructive possession jury charge where the defendant was charged with possession of a weapon and there was no view of the evidence from which the jury could have concluded that he constructively possessed a handgun.

[People v Ross \(2023 NY Slip Op 01381\)](#)

People v Newman

214 AD3d 1451

(4th Dept) (3/27/23 DOI)

Reversed in part. Error to grant People's request to charge 3rd degree criminal trespass as a lesser included offense of 3rd degree burglary. It was possible to commit the greater offense, as charged in the indictment, without committing the lesser offense.

[People v Newman \(2023 NY Slip Op 01621\)](#)

People v Garcia

216 AD3d 438

(1st Dept) (5/8/23 DOI)

New trial. Lower court should have granted the defendant's request for a circumstantial evidence charge because there was no direct evidence of his participation in the conspiracy. The standard instructions on reasonable doubt and inferences were insufficient.

[People v Garcia \(2023 NY Slip Op 02392\)](#)

People v Swanton

216 AD3d 1441

(4th Dept) (5/8/23 DOI)

New trial. The trial court erred in not charging the jury on justification. Even if the defendant's account of a physical altercation was "extraordinarily unlikely," a reasonable view of the evidence supported his request for the justification charge.

[People v Swanton \(2023 NY Slip Op 02433\)](#)

Mode of proceedings

Jury notes

People v Baptiste

216 AD3d 577

(1st Dept) (5/30/23 DOI)

New trial. *O'Rama* error in response to four jury notes. The trial court did not show the notes to the parties, and the record did not indicate that there was any response to the notes at all.

[People v Baptiste \(2023 NY Slip Op 02835\)](#)

Notice of defendant's statement

People v Weathers

213 AD3d 466

(1st Dept) (2/14/23 DOI)

New trial. The People should not have been permitted to submit evidence of the defendant's statement to police because it was not properly noticed under CPL 710.30 (1) (a). The interview generally had been disclosed, but the specific statement was first revealed during trial testimony. The error was not harmless.

[People v Weathers \(2023 NY Slip Op 00741\)](#)

Prosecutorial misconduct

People v Nellis

2023 NY Slip Op 03046

(3d Dept) (6/12/23 DOI)

Reversal based on multiple instances of prosecutorial misconduct, compounded by the repeated presentation of bad acts evidence; the court's failure to intervene; and the absence of proof at trial of motive. Error for the prosecution to try to create the impression that the defendant had a violent propensity when angered.

[People v Nellis \(2023 NY Slip Op 03046\)](#)

Quantum of evidence

Assault / physical injury / serious physical injury

People v Davis

214 AD3d 1334

(4th Dept) (3/20/23 DOI)

One assault count was dismissed because the evidence was legally insufficient as to the element of physical injury.

[People v Davis \(2023 NY Slip Op 01393\)](#)

People v Dowdell

214 AD3d 1363

(4th Dept) (3/20/23 DOI)

Evidence was legally insufficient to prove assault 2. The complainant never testified to the degree of pain he experienced, and the injury only resulted in slight scratches, redness, minor swelling and possible minor bruising.

[People v Dowdell \(2023 NY Slip Op 01432\)](#)

People v Wheeler

2023 NY Slip Op 02736

(COA) (5/22/23 DOI)

People's appeal. Assault 2 conviction reversed. The victim testified that the defendant punched him in the mouth, causing "aching" pain, bleeding, and swelling. Such proof was legally sufficient to establish physical injury. Conviction reinstated.

[People v Wheeler \(2023 NY Slip Op 02736\)](#)

Burglary

People v Taylor

215 AD3d 431

(1st Dept) (4/10/23 DOI)

The defendant's conviction for burglary of a doctor's office—based on the presence of his DNA on an open soda can in the reception area—was against the weight of the evidence. Testimony did not address if there was an innocent explanation for the presence of the defendant or the soda can.

[People v Taylor \(2023 NY Slip Op 01848\)](#)

CPW

People v Alcaarez-Ubiles

215 AD3d 1264

(4th Dept) (5/1/23 DOI)

Weapons-related convictions reversed. The defendant's mere presence in the house where a rifle was located was insufficient to establish constructive possession.

[People v Alcaarez-Ubiles \(2023 NY Slip Op 02226\)](#)

Criminal possession of stolen property

People v Giles

214 AD3d 1460

(4th Dept) (3/27/23 DOI)

Conviction for CPSP 3 reduced to 4th degree. Evidence established that the defendant had stolen property but proof of value exceeding \$3,000 was legally insufficient.

[People v Giles \(2023 NY Slip Op 01628\)](#)

Dangerous instrument

People v Weng

215 AD3d 986

(2d Dept) (5/1/23 DOI)

Convictions for assault 2, CPW 4, and assault 3 vacated and those counts dismissed. Evidence was legally insufficient to establish that the bamboo stick with which the defendant struck her 2-year-old child—which was not produced at trial—constituted a “dangerous instrument” that was “readily capable of causing death or other serious physical injury.”

[People v Weng \(2023 NY Slip Op 02134\)](#)

People v Ames

2023 NY Slip Op 03205

(1st Dept) (6/20/23 DOI)

Conviction for assault 2 vacated because proof was legally insufficient to establish that the defendant used subway tracks as a dangerous instrument. Even if he caused the victim to fall, the People did not prove that he intended for injury to be caused by the victim striking the tracks.

[People v Ames \(2023 NY Slip Op 03205\)](#)

Incest

People v Sharlow

2023 NY Slip Op 03260

(3d Dept) (6/20/23 DOI)

Conviction for incest 1 vacated and dismissed. Proof did not establish that the complainant was young enough to meet the age element.

[People v Sharlow \(2023 NY Slip Op 03260\)](#)

Manslaughter

People v Skeeter

2023 NY Slip Op 02946

(1st Dept) (6/5/23 DOI)

Conviction for manslaughter vacated and dismissed in the interest of justice. The People did not disprove the defendant's justification defense. The mere fact that the deceased was shot in the back did not establish that the defendant was the initial aggressor or that he did not reasonably believe deadly force was being used.

[People v Skeeter \(2023 NY Slip Op 02946\)](#)

Murder 1

People v Estrella

214 AD3d 459

(1st Dept) (3/13/23 DOI)

Murder 1 conviction vacated and dismissed. Act of fatally stabbing the victim in the neck during a gang assault did not support murder 1 conviction. The defendant and his accomplices did not engage in a "course of conduct" of torturing the victim and did not "relish" inflicting extreme physical pain.

[People v Estrella \(2023 NY Slip Op 01240\)](#)

Rape 1

People v Patterson

214 AD3d 674

(2d Dept) (3/6/23 DOI)

Reversed and dismissed. No evidence that the defendant used actual force or expressly threatened the complainant, whose testimony was insufficient to establish that he implicitly threatened her.

[People v Patterson \(2023 NY Slip Op 01103\)](#)

Rape 2

People v Bateman

212 AD3d 993

(3d Dept) (1/23/23 DOI)

Reversal of conviction and dismissal of one count of 2nd degree rape. No evidence corroborated the defendant's admission that he and the victim engaged in sexual intercourse "a few times" in August 2017 when he was 46 and she was 14. Thus, the evidence was legally insufficient.

[People v Bateman \(2023 NY Slip Op 00249\)](#)

Restraints/shackles

People v Sanders

39 NY3d 216

(COA) (2/14/23 DOI)

Reversed. In the absence of a special need, shackling the defendant during the jury's reading of its verdict and the court's polling of the jurors was a due process violation. The error was not harmless.

[People v Sanders \(2023 NY Slip Op 00692\)](#)

Right to call witness

People v Osman

213 AD3d 1256

(4th Dept) (2/6/23 DOI)

Reversed. County Court abused its discretion in precluding the defendant from calling a nurse practitioner, who would have provided relevant defense testimony. The defendant showed good cause for his delay in noticing the witness, and the People did not demonstrate prejudice.

[People v Osman \(2023 NY Slip Op 00581\)](#)

Right to counsel

People v Spellicy

2023 NY Slip Op 03099

(4th Dept) (6/12/23 DOI)

Affirmed. The defendant argued that his right to self-representation was violated because the court granted his request to proceed pro se days before trial, leaving him unable to properly prepare. Because the defendant's challenge was to the timing and manner of the court's decision—rather than his right to self-representation—it was subject to harmless error review.

[People v Spellicy \(2023 NY Slip Op 03099\)](#)

Right to public trial

People v Reid

2023 NY Slip Op 02755

(COA) (5/30/23 DOI)

The defendant's Sixth Amendment right to a public trial was violated when the judge closed the courtroom for the second half of trial. *Waller* (467 US 39 [1984]) requirements were not met. The judge did not create a sufficient record to justify a complete closure and, as a result, the closure was not narrowly tailored to the interests to be protected.

[People v Reid \(2023 NY Slip Op 02755\)](#)

People v Muhammad

2023 NY Slip Op 02756

(COA) (5/30/23 DOI)

Judge's policy of prohibiting the public from entering or exiting the courtroom during witness testimony resulted in a violation of the Sixth Amendment right to a public trial. The judge failed to establish procedures to ensure that those who timely arrived would be permitted entry.

[People v Muhammad \(2023 NY Slip Op 02756\)](#)

Sirois hearing

People v Robinson

216 AD3d 1252

(3d Dept) (5/15/23 DOI)

New trial. Supreme Court erred by summarily granting the motion for a *Sirois* hearing because the People's proof (jail calls) failed to show that the defendant procured the witness's unavailability. The evidence was subject to competing inferences, and he should have been given a chance to test the causal link between the complainant's refusal to testify and the calls.

[People v Robinson \(2023 NY Slip Op 02561\)](#)

Statutory speedy trial

People v King

216 AD3d 1400

(4th Dept) (5/8/23 DOI)

Reversal. Indictment dismissed. The People announced readiness in March 2019. Defense counsel moved for 30.30 dismissal on the day of trial because the People had not filed a COC. Supreme Court erred in denying the motion. Because the case was pending in the trial court and not on appeal when the discovery laws changed, *People v Galindo* (38 NY3d 199 [2022]) did not control.

[People v King \(2023 NY Slip Op 02409\)](#)

SENTENCING

Appellate Division authority

People v Ba

39 NY3d 1130

(COA) (3/27/23 DOI)

Remanded for a determination of whether the sentence was unduly harsh and excessive. Concurring opinion found that the Appellate Term's language showed that the court incorrectly believed that it was bound to uphold the sentence because it was bargained for and within the legal parameters.

[People v Ba \(2023 NY Slip Op 01468\)](#)

Catu error

People v Bell

213 AD3d 1273

(4th Dept) (2/6/23 DOI)

Judgment reversed, remittal. The defendant's VOP admission was involuntary because County Court never informed him that PRS would be imposed if he was sentenced to prison.

[People v Bell \(2023 NY Slip Op 00594\)](#)

Court's discretion

People v Amin

2023 NY Slip Op 03093

(4th Dept) (6/12/23 DOI)

Sentence vacated after guilty plea. Supreme Court failed to apprehend the extent of its sentencing discretion. The court erroneously indicated that a showing of mitigating circumstances was required before a sentence other than a determinate term could be imposed. However, a determinate sentence was not mandatory except in circumstances absent here.

[People v Amin \(2023 NY Slip Op 03093\)](#)

Concurrent/consecutive

People v Bailey

213 AD3d 499

(1st Dept) (2/21/23 DOI)

Sentences for murder and CPW (intent to use unlawfully) modified to run concurrently. The People did not show that consecutive sentences were permissible. Without evidence of possession of the firearm other than at the moment of the shooting, it was not clear that possession and use were separate acts.

[People v Bailey \(2023 Slip Op 00822\)](#)

People v Truitt

213 AD3d 1145

(3d Dept) (2/27/23 DOI)

Convictions for murder 2 reversed because they were inclusory concurrent counts of murder 1 under CPL 300.40.

[People v Truitt \(2023 NY Slip Op 01028\)](#)

People v Burton

215 AD3d 1054

(3d Dept) (4/24/23 DOI)

Convictions for murder 2 reversed because they were inclusory concurrent counts of murder 1 under CPL 300.40.

[People v Burton \(2023 NY Slip Op 01919\)](#)

People v McKoy

2023 NY Slip Op 03119

(4th Dept) (6/12/23 DOI)

Sentences for murder 2 and CPW 2 convictions modified to run concurrently. The People failed to present evidence that the defendant's possession of the loaded firearm on the date of the offense was separate and distinct from the act of shooting the victim.

[People v McKoy \(2023 NY Slip Op 03119\)](#)

DVSJA

People v Partlow

216 AD3d 1469

(4th Dept) (5/15/23 DOI)

Sentence cut in half. Evidence supported a finding that the defendant was a victim of domestic violence during her relationship with the victim; she was subjected to substantial abuse; and such abuse was a significant contributing factor to her criminal behavior. A sentence within the normal sentencing range would have been "unduly harsh."

[People v Partlow \(2023 NY Slip Op 02479\)](#)

Enhanced sentence

People v Carson

213 AD3d 690

(2d Dept) (2/6/23 DOI)

The defendant pleaded guilty in exchange for capped sentences of 5-year terms with 2 years of PRS on each count, to run concurrently. County Court had a sufficient basis to impose an enhanced sentence after the defendant violated terms prior to sentencing. However, the enhanced sentence was excessive.

[People v Carson \(2023 NY Slip Op 00435\)](#)

Harsh and excessive sentence

People v Morrison

2023 NY Slip Op 03145

(4th Dept) (6/12/23 DOI)

PRS term reduced from 3 years to 2½ years in the interest of justice. The term imposed departed from the express terms of the plea agreement, but there had been no material change since the plea.

[People v Morrison \(2023 NY Slip Op 03145\)](#)

People v Baldwin

39 NY3d 1097

(COA) (3/27/23 DOI)

Appeal from order affirming sentence dismissed as moot. The defendant contended that the standard of review applied by the Third Department to determine whether to reduce a sentence in the interest of justice—requiring extraordinary circumstances or an abuse of discretion—was incorrect. In his concurrence, Judge Wilson explained that while the appeal was pending in the Court of Appeals, the Third Department corrected its longstanding use of the wrong standard.

[People v Baldwin \(2023 NY Slip Op 01467\)](#)

Illegal

People v Nyack

214 AD3d 903

(2d Dept) (3/27/23 DOI)

Although not charged with CPW 3, defendant pleaded guilty to attempted CPW 3 as a count added to the indictment upon consent. Because he did not plead guilty to the attempted crime as a lesser included offense of a count charged in the indictment, the conviction did not constitute a violent felony offense. The defendant's sentencing as a violent felony offender was illegal.

[People v Nyack \(2023 Slip Op 01532\)](#)

People v McDowell

214 AD3d 1437

(4th Dept) (3/27/23 DOI)

The sentence of 8 years to life, imposed in exchange for a plea of guilty to 2nd degree CPW, was illegally low. The remedy was to vacate the sentence and remit for County Court to resentence the defendant or permit both parties an opportunity to withdraw from the agreement.

[People v McDowell \(2023 NY Slip Op 01606\)](#)

People v Lamoy

215 AD3d 1136

(3d Dept) (4/24/23 DOI)

Term of conditional discharge vacated. Only a 1-year term of conditional discharge may be imposed in relation to a misdemeanor conviction. The 3-year term for misdemeanor DWI conviction was illegal.

[People v Lamoy \(2023 NY Slip Op 02035\)](#)

People v McCall

216 AD3d 1317

(3d Dept) (5/22/23 DOI)

Remitted for resentencing. The defendant's predicate felony conviction occurred more than 10 years before the instant offense, and the People did not demonstrate that the look-back period was tolled by incarceration. Although not preserved, the issue of the illegality of the sentence was clear from the face of the record.

[People v McCall \(2023 NY Slip Op 02719\)](#)

Orders of protection

People v Augustin-Miranda

215 AD3d 981

(2d Dept) (5/1/23 DOI)

Remitted for a determination of the OOP expiration date. The lower court erred in setting the duration of the OOP until a certain date, less the defendant's jail time credit, "to be computed by the applicable department of correction." CPL 530.10 requires a definite expiration date.

[People v Augustin-Miranda \(2023 NY Slip Op 02131\)](#)

People v Delaurentis

216 AD3d 664

(2d Dept) (5/8/23 DOI)

Expiration provision of the OOP vacated and remittal for new determination of duration of the order. An OOP issued at the time of sentencing should credit the defendant for jail time served.

[People v Delaurentis \(2023 NY Slip Op 02326\)](#)

Predicate felony not equivalent

People v Hairston

213 AD3d 694

(2d Dept) (2/6/23 DOI)

Vacatur of persistent violent felony offender adjudication in the interest of justice. The defendant's prior convictions from Ohio did not involve all essential elements of any NY violent felony.

[People v Hairston \(2023 NY Slip Op 00439\)](#)

People v Caraballo

213 AD3d 1152

(3d Dept) (2/27/23 DOI)

Sentence vacated and remitted for resentencing. People's submissions to prove the defendant's prior felony conviction—the Massachusetts equivalent of a commitment order and his public docket report—lacked the out-of-state certification required under CPLR 4540 (c).

[People v Caraballo \(2023 NY Slip Op 01029\)](#)

Presence required

People v Barksdale

216 AD3d 534

(1st Dept) (5/22/23 DOI)

Sentence vacated and remitted for resentencing. The defendant had a right to be personally present at sentencing, and he did not expressly waive that right during the virtual proceeding.

[People v Barksdale \(2023 NY Slip Op 02744\)](#)

Restitution

People v Chung

213 AD3d 107

(2d Dept) (2/21/23 DOI)

Restitution provision of sentence vacated and remitted for a hearing. Trial court must hold a hearing if the defendant requests one or the record does not contain sufficient facts to support a finding regarding the amount of restitution.

[People v Chung \(2023 NY Slip Op 00880\)](#)

People v Case

214 AD3d 1379

(4th Dept) (3/20/23 DOI)

Restitution amount reduced to the cost of complainant's insurance deductible payment. Labor costs for the complainant's employees to investigate the offense were "consequential financial losses,"

not “actual out-of-pocket losses.” The conviction was not for identity theft, and travel expenses for employees who testified at trial were not compensable as restitution.

[People v Case \(2023 NY Slip Op 01438\)](#)

YOUTHFUL OFFENDER

People v Raul A.

215 AD3d 500

(1st Dept) (4/24/23 DOI)

Conviction vacated and CPW charge dismissed. CPW count charged the defendant with possession of a firearm in his home. But under Penal Law 30.00 (2), the 15-year-old defendant could not be held criminally liable unless he possessed the gun on school grounds. He was entitled to a YO determination on the remaining conviction.

[People v Raul A. \(2023 NY Slip Op 01970\)](#)

People v Carranza

216 AD3d 814

(2d Dept) (5/15/23 DOI)

Conviction affirmed, but sentence vacated and remitted for YO determination. A court must make a YO determination in every case where the defendant is eligible—even in the absence of a request or where there is a plea agreement to forgo the determination.

[People v Carranza \(2023 NY Slip Op 02535\)](#)

SORA

Affirmed

People v Luck

212 AD3d 535

(1st Dept) (1/30/23 DOI)

Underlying elements of the defendant’s federal conviction for conspiracy to commit sex trafficking of a minor were “within the scope of the New York offense” of 2nd degree promoting prostitution, thus requiring sex offender registration.

[People v Luck \(2023 NY Slip Op 00275\)](#)

People v Cortez-Moreno

215 AD3d 698

(2d Dept) (4/10/23 DOI)

Although the defendant was improperly assigned 30 points on risk factor 1 for being “armed with a dangerous instrument,” he should have been assigned 10 points on this factor for the use of forcible compulsion, resulting in a presumptive risk level 2. The Second Department held that an upward departure to level 3 was warranted, despite the lower court having not addressed the People’s alternative request for one.

[People v Cortez-Moreno \(2023 Slip Op 01811\)](#)

People v Weber

2023 NY Slip Op 03301

(COA) (6/20/23 DOI)

In a prior appeal, the Fourth Department reversed an order classifying the defendant as a level 3 offender. On remittal, the People successfully requested an upward departure for the first time. COA affirmed, finding the remittal proper. Judge Wilson dissented, noting that appellate courts are not authorized to grant relief to a nonappealing party, and the opportunity to raise an omitted argument constituted affirmative relief.

[People v Weber \(2023 NY Slip Op 03301\)](#)

People v Anthony

2023 NY Slip Op 03303

(COA) (6/20/23 DOI)

Affirmance of the defendant's level 3 sex offender designation and denial of his request for a downward departure. Not an abuse of discretion for lower court to credit his proffered mitigation factors but find a downward departure unwarranted. Judges Rivera and Wilson dissented.

[People v Anthony \(2023 NY Slip Op 03303\)](#)

Dismissed

People v Allen

213 AD3d 73

(1st Dept) (2/6/23 DOI)

Correction Law § 168-f (3) was unconstitutionally vague as applied to a homeless individual who did not have an address to report or verify.

[People v Allen \(2023 NY Slip Op 00496\)](#)

Held in abeyance

People v Straker

215 AD3d 503

(1st Dept) (4/24/23 DOI)

Appeal held in abeyance. Lower court assessed 20 points for risk factor 7 (relationship between offender and victim) but made no findings of fact or conclusions of law relevant to this factor. Case remitted for findings and conclusions based on proof already introduced.

[People v Straker \(2023 NY Slip Op 01971\)](#)

Reversed/modified

People v Conyers

212 AD3d 417

(1st Dept) (1/9/23 DOI)

The defendant was convicted of attempted 2nd and 3rd degree burglary as sexually motivated felonies and certified as a sex offender. Sex offender certifications were vacated since the convictions were not registerable sex offenses.

[People v Conyers \(2023 NY Slip Op 00042\)](#)

People v Delacruz

212 AD3d 469

(1st Dept) (1/17/23 DOI)

SORA risk level reduced from 2 to 1. The victim’s testimony—that she was “fighting” with the defendant, trying to push him away, and shouting “stop” during the sexual assault—did not support 20 points for a physically helpless victim.

[People v Delacruz \(2023 NY Slip Op 00165\)](#)

People v Hernandez

213 AD3d 705

(2d Dept) (2/6/23 DOI)

SORA risk level reduced from 3 to 1. The defendant’s RAI score indicated a presumptive level 1. But prior sex offense conviction (3rd degree rape based solely on complainant’s age) triggered automatic override. Departure warranted because strict application of the override would result in an overassessment of risk.

[People v Hernandez \(2023 NY Slip Op 00451\)](#)

People v Morgan

213 AD3d 1244

(4th Dept) (2/6/23 DOI)

Sexually violent designation vacated. The out-of-state conviction covered the same conduct as the NY offense of 2nd degree sexual abuse, which is not a sexually violent offense under SORA.

[People v Morgan \(2023 NY Slip Op 00569\)](#)

People v Perez

214 AD3d 682

(2d Dept) (3/6/2023 DOI)

Reversed and remanded for determination of upward departure request. Lower court improperly assessed 20 points for factor 7 because the People failed to establish that the defendant and victim were strangers. To the contrary, the People conceded that they were related.

[People v Perez \(2023 NY Slip Op 01108\)](#)

People v Winter

215 AD3d 1010

(3rd Dept) (4/10/23 DOI)

Improper imposition of SORA registration requirement after 3rd degree burglary conviction. Such crime as a sexually motivated felony is not a registerable offense.

[People v Winter \(2023 NY Slip Op 01820\)](#)

People v Motta

215 AD3d 771

(2d Dept) (4/17/23 DOI)

Reversal of order and remand for new hearing. Although agreeing that the defendant was a presumptive level 3, counsel did not say that he consented to a level 3 designation. Further, defense counsel failed to litigate any aspect of the adjudication. IAC found.

[People v Motta \(2023 NY Slip Op 01908\)](#)

People v Ghose

215 AD3d 886

(2d Dept) (4/24/23 DOI)

Reversal of order dismissing petition for downward modification and reconsideration of original determination that the defendant's foreign conviction qualified as a registerable sex offender. Petitions for downward modification are permitted annually so there was no procedural bar.

[People v Ghose \(2023 NY Slip Op 02021\)](#)

People v Vakhoula

215 AD3d 1134

(3d Dept) (4/24/23 DOI)

Conviction modified to vacate the provision certifying the defendant as a sex offender. Burglary 2 as a sexually motivated felony is not a registerable offense.

[People v Vakhoula \(2023 NY Slip Op 02034\)](#)

People v Donshik

215 AD3d 597

(1st Dept) (5/1/23 DOI)

SORA risk level reduced from 2 to 1 because the record did not support an upward departure. Lower court erred in relying on the number of images possessed and the length of time the defendant had been collecting/viewing child porn. The original source of those allegations was unknown, and the court's conclusions were not supported by the record.

[People v Donshik \(2023 NY Slip Op 02186\)](#)

People v Green

216 AD3d 1115

(2d Dept) (5/30/23 DOI)

The People's failure to give the defendant at least 10 days' notice that they were seeking a different determination than the Board recommended deprived him of a meaningful opportunity to respond. New hearing was required.

[People v Green \(2023 NY Slip Op 02799\)](#)

People v Worley

2023 NY Slip Op 03300

(COA) (6/20/23 DOI)

Remitted for new hearing after SORA court violated the defendant's due process rights. Although the risk assessment score made him a presumptive risk level 2, the court stated that an upward departure was warranted based on extensive disciplinary history and then invited the ADA to request such a finding. The defendant was denied a meaningful opportunity to be heard.

[People v Worley \(2023 NY Slip Op 03300\)](#)

POST-CONVICTION

440.10 motions

Denial reversed

People v McCray

213 AD3d 423

(1st Dept) (2/6/23 DOI)

Reversal of denial of CPL 440.10 motion claiming IAC after hearing. Highly prejudicial decisions by trial counsel that were neither strategic nor objectively reasonable included waiving preclusion of an unnoticed ID made by the only eyewitness.

[People v McCray \(2023 NY Slip Op 00502\)](#)

People v Thornton

213 AD3d 987

(3d Dept) (2/6/23 DOI)

Summary denial reversed in the interest of justice. County Court judge should have recused himself because his law clerk was the former DA responsible for the defendant's prosecution and conviction. Judges must appear neutral.

[People v Thornton \(2023 NY Slip Op 00460\)](#)

People v Everson

213 AD3d 1294

(4th Dept) (2/14/23 DOI)

Reversal of denial of CPL 440.10 motion claiming IAC after hearing. There was no tactical reason for defense counsel's failure to investigate a complainant as a potential defense witness.

[People v Everson \(2023 NY Slip Op 00761\)](#)

People v Rice

214 AD3d 1075

(3d Dept) (3/13/23 DOI)

Reversal of denial of CPL 440.10 motion. The motion court should have conducted a hearing to allow the defendant to create a record as to whether she was entitled to assert the "*Hodgdon* defense." Because *People v Hodgdon* (175 AD3d 65 [3d Dept 2019]) announced a new rule after the direct appeal was decided, counsel's failure to raise the issue sooner was justified.

[People v Rice \(2023 NY Slip Op 01211\)](#)

People v Guzman-Caba

214 AD3d 564

(1st Dept) (3/27/23 DOI)

The trial court abused its discretion in summarily denying a CPL 440.10 motion based on a *Padilla* violation where the motion contained adequately supported allegations of fact for an IAC claim, and counsel did not recall discussing immigration consequences with his client.

[People v Guzman-Caba \(2023 NY Slip Op 01593\)](#)

People v Robinson

214 AD3d 904

(2d Dept) (3/27/23 DOI)

Reversal of denial of CPL 440.10 (1) (g-1) motion after a hearing. New DNA evidence showed that the defendant was not the source of male DNA recovered from victim. Because the defense theory was mistaken ID and the People's trial proof to establish ID was weak, there was a reasonable probability the verdict would have been different had the DNA proof been admitted.

[People v Robinson \(2023 Slip Op 01533\)](#)

People v Flores

2023 NY Slip Op 02768

(1st Dept) (5/30/23 DOI)

440.10 denial reversed, conviction vacated, and indictments dismissed. *Brady* violation occurred. The People did not disclose impeachment evidence that the Crime Victim Assistance Unit was helping the complainant obtain a U visa. The complainant's credibility was central, and the suppressed evidence could have raised enough reasonable doubt to affect the outcome.

[People v Flores \(2023 NY Slip Op 02768\)](#)

People v Bradford

2023 NY Slip Op 03187

(COA) (6/20/23 DOI)

Unbeknownst to the trial court or the prosecution, the Sheriff's Department made the defendant wear a stun belt during trial. Because a hearing was necessary to determine whether defense counsel was aware of the use of the restraint, it was error to summarily deny the portion of the defendant's 440 motion claiming IAC.

[People v Bradford \(2023 NY Slip Op 03187\)](#)

440.20 motions

Denial reversed

People v Shearer

213 AD3d 699

(2d Dept) (2/6/23 DOI)

Error for trial court to rely on PSI prepared in connection with the defendant's unrelated prior conviction. CPL 390.20 precludes the waiver of a presentence report when an indeterminate sentence is imposed.

[People v Shearer \(2023 NY Slip Op 00445\)](#)

People v Parsley

216 AD3d 1001

(2d Dept) (5/22/23 DOI)

County Court illegally altered the sentence in violation of CPL 430.10. The initial sentence and commitment form reflected the sentence unambiguously imposed by the sentencing court.

[People v Parsley \(2023 NY Slip Op 02683\)](#)

440.46-a

People v Graubard

214 AD3d 143

(2d Dept) (3/20/23)

Reversal of an order granting a CPL 440.46-a motion, which replaced conviction for criminal possession of marijuana 1 with possession of cannabis 1. While the trial court had the authority to substitute convictions, it had to consider whether substitution was in the interest of justice.

[People v Graubard \(2023 NY Slip Op 01308\)](#)

SARA

People ex rel. E.S. v Livingston Corr. Fac.

2023 NY Slip Op 03298

(COA) (6/20/23 DOI)

COA reversed order converting the habeas corpus proceeding to an article 78 proceeding, converted the proceeding to a declaratory judgment action, and declared that the SARA school grounds restriction applies to youthful offenders.

[People ex rel. E.S. v Supt., Livingston Corr. Facility \(2023 NY Slip Op 03298\)](#)

People ex rel. Rivera v Woodbourne Corr. Fac.

2023 NY Slip Op 03299

(COA) (6/20/23 DOI)

The SARA school grounds condition did not violate the Ex Post Facto Clause when applied to offenders whose crimes predated the 2005 amendments. There is a strong presumption that legislative enactments are constitutional, and only the clearest proof will override legislative intent and transform a civil remedy into a criminal penalty.

[People ex rel. Rivera v Supt., Woodbourne Corr. Facility \(2023 NY Slip Op 03299\)](#)